UNITED STATES OF AMERICA

BEFORE THE

CONSUMER FINANCIAL PROTECTION BUREAU

Amendment to Regulation F, CFR Part 1006
implementing the Fair Debt Collection Practices Act
CFPB Docket No. CFPB-2019-0022

COMMENTS IN OPPOSITION TO THE PROPOSED RULE SUBMITTED BY ANTI-POVERTY NONPROFIT ORGANIZATIONS SERVING DISTRICT OF COLUMBIA RESIDENTS

INTRODUCTION[1]

Congress through the Fair Debt Collection Practices Act (FDCPA) sought "to eliminate abusive debt collection practices…. and impose[d] various procedural and substantive obligations on debt collectors."[2] However, the Consumer Financial Protection Bureau (CFPB)'s proposed rule significantly tilts the playing field dramatically in *favor* of the debt collection industry and opens the door to the expansion of the types of abusive practices Congress sought to eliminate in the statute, abuses that disproportionately impact communities of color.

District of Columbia residents have a particularly high stake in the ongoing vitality of the CFPB and a robust construction of the FDCPA. DC residents have a higher per capita complaint rate than any state in the nation. And the trend lines are concerning. In 2018, for example, DC service members, veterans, and their families submitted 139 complaints to the CFPB, a 21% increase from 2017.

The below-signed coalition of organizations includes members with substantial experience advocating for families in DC with lower incomes in a range of legal and policy contexts, including those with experience representing alleged debtors in lawsuits and legal matters against debt collectors, debt buyers, primary creditors, and businesses. Members of the coalition are particularly mindful of the civil rights dimension of this problem, as their practices reveal the disproportionate impact abusive and illegal debt collection tactics have on persons of color and members of other protected classes, including seniors and persons with disabilities. These perspectives inform the following comments on the proposed rule.

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[1] Key contributions to these comments were made by Scott Lessne, Gary Baldwin, Katie Sass, James Janaitis, and Elliott Laws of the law firm Crowell & Moring, LLP., and by Tzedek DC volunteer attorney Ishai Mooreville.
[2] *Sheriff v. Gillie*, 136 S. Ct. 1594, 1596 (2016) (internal quotation marks omitted).

The proposed rule is deeply flawed as a matter of law and as a matter of policy. If adopted, it would skew the balance between consumers and debt collectors to unjustifiably favor debt collectors in at least three ways, by:

- Allowing creditors to threaten lawsuits on "zombie," or time-barred debt unless they "know or should know" that the debt is time barred. Creditors, not the individuals they sue, should bear the burden of ascertaining whether a debt is time-barred or not—especially given the other protections available to creditors under the FDCPA, and because the risks of zombie debt abuse disproportionately impact community members of color and those with disabilities.

- Authorizing an unreasonably high volume of contacts per week by creditors on a single debt. The rule would limit how often creditors can contact debtors—but would only do so *per debt*. Therefore, a creditor could contact a debtor with multiple debts (as is often the case) dozens of times per week, or even more. A consumer with 8 medical debts could be called up to *56 times in one week*.

- Permitting creditors to contact debtors using "any medium"—defined to include texts and social media—with no limit whatsoever, on an automated basis. While some debtors may find it advantageous to receive messages using such platforms, others may find it intrusive, harassing, or worse. Individuals who are potentially harassed should have the right to decide the medium through which creditors may contact them.

The proposed rule's incentivizing of abusive tactics by the debt collection industry is especially problematic due to the typically wide disparity between the parties. In such a context, as the OMB has noted, government should enure that minimum quality standards are met when it is time-consuming or costly for consumers to evaluate complex information about products or services.[3] It follows that a strong burden of persuasion rests on those who would weaken current protections, even under a deregulatory or lightened regulation perspective.

The Bureau has come nowhere close to meeting that burden in the proposed rule. The potential for abuse by debt collectors overrides any benefits achieved from establishing a rule upon which consumers can rely for protection against abusive debt collectors. Below, we provide a discussion and recommendations with respect to specific sections of the proposed rule.

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[3] "When it is time-consuming or costly for consumers to evaluate complex information about products or services… [t]hey may expect government to ensure that minimum quality standards are met." Circular A-4, p.5. See also, e.g., *Shrouded Attributes, Consumer Myopia and Information Suppression in Competitive Markets, Xavier Gabaix and David Laibson, The Quarterly Journal of Economics* (May 2006) at 505-540.

I. IMPACT OF THE COLLECTIONS ON THE LIVES OF D.C. RESIDENTS

The proposed rules threaten to have devastating effects on the everyday lives of our clients and other low-income DC residents by exposing them to intrusive phone calls, texts, and e-mails regarding unproven debts – including those time-barred from collection –on a daily, weekly or monthly basis. Abusive debt collection practices disparately affect people of color, people with disabilities, and members of other marginalized populations. Such communications amount to harassment and impede our clients and others from focusing on their jobs, providing for their families, and trying to make a living.

Over thirty percent of respondents identified the harassment of debt collection calls as the number one legal complaint in their lives in a 2016 survey of DC residents with lower incomes conducted by the DC Consortium of Legal Services Providers. Over half of DC pro bono legal service providers' collective clients are struggling with more than one account in collections.

Our client community commonly encounters unscrupulous debt collectors and would be protected by tighter regulation of the industry. For example, one elderly resident was told that she would be evicted from her public housing apartment if she did not make a payment on a debt that was over twenty years old. Another elderly resident received constant harassing calls from a debt collector even though she had filed for bankruptcy protection and informed the collector of her filing. Countless disabled and senior residents have been cajoled into make payments even when their only sources of income – such as Social Security Disability and Retirement – are federally protected from attachment.

II. COLLECTION OF TIME-BARRED DEBT

With regard to the collection of time-barred debt, the CFPB's proposed § 1006.26(b) only prohibits the debt collector from threatening legal action with regard to a debt if the debt collector "knows or should know" that it is time-barred debt (the "Knowledge Standard"). The Bureau's rationale for using this proposed standard, instead of a strict liability standard, is that "a debt collector may be genuinely uncertain even after undertaking a reasonable investigation; CFPB claims this could occur, for example, when the case law in a State is unclear as to which statute of limitations applies to a particular debt."[4] Ultimately, the obligation to know whether the statute of limitations has expired has to either be with the debt collector or the consumer, and the proposed Knowledge Standard would place the burden on the consumer by default. A strict liability standard should be adopted because: (a) the debt collector is in the best position to determine if a debt is time-barred; and (b) the debt collector is otherwise protected from bona fide mistakes by other sections of the FDCPA.

[4] *Bureau of Consumer Financial Protection; Debt Collection Practices (Regulation F),* 84 Fed. Reg. 23274 (May 21, 2019) ("NPRM"), 23329.

A. The Debt Collector is in the Best Position to Determine if a Debt is Time-Barred

In interpreting the FDCPA, the governing judicial interpretations have made clear that when looking at whether an action is false or misleading the "least-sophisticated consumer" standard should be used instead of the higher "reasonable consumer" standard. [5] As the Supreme Court has noted in the precise context of a debt collector filing suit on a time-barred debt:

> Because few unsophisticated consumers would be aware that a statute of limitations could be used to defend against lawsuits based on stale debts, such consumers would unwittingly acquiesce to such lawsuits….[E]ven if the consumer realizes that she can use time as a defense, she will more than likely still give in rather than fight the lawsuit because she must still expend energy and resources and subject herself to the embarrassment of going into court to present the defense.[6]

The onus cannot be on the resource-limited, typically legally unsophisticated individual to determine whether the statute of limitations is time-barred. The potential ramifications to the consumer for not knowing this information can result in a significantly and disproportionately negative outcome for the consumer, especially when a consumer's partial payment may, without that person's knowledge, restart the clock on the statute of limitations, giving the debt collector a right to sue which had previously terminated as a matter of law.[7]

In contrast, debt collectors are well-positioned to determine whether a debt is time-barred. Industry collectors should be required to make an affirmative effort to determine if a debt is time-barred prior to commencing collection activity. Debt collection is their chosen profession, and likely an area where they have significant experience and industry resources to draw upon, including, for example, corporate subsidiaries and affiliates of large corporations such as Encore Capital, a billion dollar company. The debt collection industry is highly regulated by both the FDCPA and various state laws, and any experienced debt collector has experience doing business subject to these various rules. Additionally, debt collectors participate in industry associations such as ACA International and the National Association of Credit Management that can provide resources and training on the statute of limitations and determining whether a debt is time-barred.[8] If, given their experience, review of available industry resources, and other diligence, they are unable to determine whether a debt is time-barred, then a debt collector always has the option to not pursue the particular debt or make the appropriate disclosures required under the FDCPA.

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[5] *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254, 1258-9 (11th Cir. 2014); *LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1200 (11th Cir. 2010); *Tatis v. Allied Interstate, LLC*, 882 F.3d 422, 427 (3d Cir. 2018).

[6] *Midland Funding, LLC v. Johnson*, 137 S. Ct. 1407, 1419 (2017) (quoting *Kimber v. Federal Financial* Corp., 668 F. Supp. 1480, 1487 (MD Ala. 1987)).

[7] *Daugherty v. Convergent Outsourcing, Inc.*, 836 F.3d 507, 512-13 (5th Cir. 2016); *Baye v. Midland Credit Mgmt.*, No. 17-4789, 2017 U.S. Dist. LEXIS 180062, at *26-27 (E.D. La. Oct. 31, 2017).

[8] A search for "statute of limitations" on the ACA International website conducted on July 31, 2019 revealed over 120 hits for relevant materials.
https://www.acainternational.org/search?s=statute%20of%20limitations&h=4&t=0&o=1&p=1

B. Debt Collectors Retain Sufficient and Meaningful Protections Under a Strict Liability Rule

The Bureau should adopt a strict liability standard instead of the Knowledge Standard. Debt collectors would still have protection under 15 U.S.C. § 1692k for actions that "are not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." This is an established standard that has been refined for particular circumstances through various court decisions.[9] In contrast, the proposed Knowledge Standard is ambiguous, leaving open the possibility for misinterpretation by consumers, debt collectors, and even courts.

15 U.S.C.A. § 1692k is specifically intended to create a limited exception for bona fide errors when strict liability would otherwise apply. This is the standard applied to all other violations of the FDCPA under 15 U.S.C.A. § 1692e for false or misleading statements. The standard for time-barred debt, which is derived from the prohibition of false or misleading statements, should be no different.

III. FREQUENCY OF DEBT COLLECTION COMMUNICATIONS

The CFPB's proposed § 1006.14(b)(2) establishes bright-line limits for the frequency of debt collection phone calls.[10] Specifically, the proposed rule provides that a debt collector violates §1006.14(b)(1) by placing a call to an individual *per debt* either "more than seven times within seven consecutive days, or…within a period of seven consecutive days after having had a telephone conversation with the person in connection with the collection of such debts, with the date of the telephone conversation being the first day of the seven-consecutive-day period."[11]
The CFPB's proposal authorizes an unreasonable volume of calls. For instance, a consumer with 8 medical debts could be called up to 56 times in one week.

The proposal does not "draw the line at which a debt collector places telephone calls repeatedly or continuously with intent to annoy, abuse, or harass" a consumer.[12] Indeed, with the seven consecutive day proposal, the CFPB ignores the very evidence it cites in the NPRM that suggests the proposed rule has the "natural consequence of harassing, oppressing, or abusing any person."[13]
The CFPB recognizes that consumers with at least one debt in collection often have multiple debts in collection. In fact, its own study—cited in the NPRM—confirms that is the case for nearly 75% of consumers with a debt in collection.[14] The vast majority of consumers, therefore, would be vulnerable to receiving upward of fourteen or twenty-one calls per week.
Even with only one debt in collection, the proposed rule permits debt collectors to call consumers too frequently.

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[9] *See, e.g. Ross v. RJM Acquisitions Funding LLC*, 480 F.3d 493, 498-99 (7th Cir. 2007*); Owen v. I. C. Sys., Inc.*, 629 F.3d 1263, 1271 (11th Cir. 2011); *Wilhelm v. Credico, Inc.*, 519 F.3d 416 (8th Cir. 2008).
[10] *NPRM* at 23309.
[11] *Id*. at 23310, 23311.
[12] *Id*. at 23312.
[13] *Id*.
[14] *Id*.; *Consumer Experiences with Debt Collection,* at 13, table 1, CONSUMER FINANCIAL PROTECTION BUREAU, https://files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf.

According to the CFPB's own study, nearly 90% of consumers who were contacted more than three times per week[15] and 74% of consumers who were contacted between one and three times per week[16] said they were contacted too often. These calls emotionally wear out unsophisticated consumers, instill additional fear, and cause consumers to capitulate to unreasonable demands due to a lack of stamina or the resources necessary to effectively challenge the collector demands.

Further, this proposed rule disproportionately impacts vulnerable consumers. For instance, a CFPB study found that 44% of non-white respondents reported being contacted by a debt collector compared to 29% of white respondents.[17] Similarly, 39% of Hispanic respondents versus 31% of non-Hispanic respondents reported being contacted about a debt.
Instead, we recommend that the CFPB measure the frequency of telephone calls on a per-*biweekly* basis. A one-week period is hardly sufficient time for cash-strapped consumers to gather the money required to make payment on a debt. After all, the most common pay period is biweekly.[18] Extending the frequency period from weekly to biweekly benefits both consumers and debt collectors. A biweekly metric accomplishes this goal by decreasing the overall frequency of calls directed toward consumers, while still allowing debt collectors the opportunity to collect payment based on a timeframe whereby the consumer is more likely to have the funds to pay the debt.

We recommend that the seven-call frequency limit apply across a two-week period. That way, a consumer would likely only be called three or four times a week regarding a debt (this lower level itself is a fairly high volume, with a call almost every business day). And if the collector decided to call seven times in the first week, the consumer would not receive any collection calls the following week. Similarly, under our recommendation, a debt collector could not initiate another phone conversation for fourteen days after having had a telephone conversation with the person in connection with the collection of such debts.

IV. ATTEMPTED COMMUNICATIONS OR COMMUNICATIONS IN ANY MEDIUM

The CFPB's proposed §1006.2(b) defines "attempt to communicate" to include initiating a communication in "any medium" and §1006.2(d) defines "communicate" and "communication" to include conveying information in "any medium."[19] While the "any medium" language is part of the definition of "communication" found in 15 U.S.C.A §1692a and has been part of the statutory scheme for some time, comment 2(d)-1 in the Official Interpretation of the NPRM broadly interprets the term to include "any oral, written, electronic or other medium" and provides examples that include "telephone, audio recording, paper document, mail, email, text message, social media or other electronic media."[20]

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[15] *NPRM* at 23311, 23312; *Consumer Experiences with Debt Collection,* at 32.
[16] *NPRM* at 23312; *Consumer Experiences with Debt Collection,* at 32.
[17] *Consumer Experiences with Debt Collection,* at 17.
[18] Matt Burgess, *How frequently do private businesses pay workers?*, BUREAU OF LABOR STATISTICS, https://www.bls.gov/opub/btn/volume-3/how-frequently-do-private-businesses-pay-workers.htm.
[19] *NPRM* at 23399.
[20] *Id*. at 23410.

Allowing for communications or attempted communications through electronic means including email, text message, social media, and other electronic media greatly expands the methods by which a debt collector can contact a consumer. Such non-traditional communication methods should not be allowed unless the consumer knowingly opts-in to such communications, and even then there should be limitations on the number of times such communications can be made. Since the NPRM was issued, the U.S. Court of Appeals for the Seventh Circuit has already specifically held that hyperlink notices in email or text messages are insufficient as methods of transmitting mandated disclosures.[21] Such hyperlink notices fail as mandated disclosures under Section 1692g(a) of the Fair Debt Collection Practices Act whether or not the consumer has consented to electronic communication under the E-Sign Act.

The NPRM includes methods of communication or attempted communication that are not traditional or expected by consumers. Rather than protecting consumers, this proposed standard would benefit debt collectors by expanding their methods of communicating with a consumer. Debt collectors would be able to leverage such allowance by sending large numbers of text messages or email messages to consumers. Text messaging a consumer could be particularly intrusive since people frequently carry their cell phone at all times and check their cell phone each time they receive a text message. This is even more problematic because there is no limitation on the frequency a debt collector may contact a consumer using one of these non-traditional means of communication.

Hyperlink notices, already deemed insufficient by the Seventh Circuit, are especially problematic as consumers who fear viruses will not click the notice link, and will likely have difficulty distinguishing between legitimate and fraudulent links. The asymmetry increases given that a debt collector could use such method of communication at little or no cost and potentially on an automated basis. Moreover, some consumers have telephone plans that charge consumers for texts sent and received; receipt of unlimited texts could impose an additional financial burden on the consumer. The use of social media is also troubling since it is a form of communication that may not go directly to the consumer, and could instead go to the social media provider and require the consumer to access the communication through the social media provider.

The use of these non-traditional methods of communication provides a clear benefit to debt collectors based on the ease with which they could be made. As noted above, based on CFPB's own study, nearly 90% of respondents that were called by a debt collector more than three times thought that there were too many calls while 74% of respondents felt that 1 to 3 calls were too many.[22] While there are no comparable statistics regarding non-traditional methods of communications proposed in the NPRM, it is difficult to conclude that consumers would react more positively regarding a similar number of text messages, especially considering that the NPRM does not place any limits on the number of text messages that could be sent.

We recognize that for some consumers there could be an advantage to the use of these non-traditional methods of communication. The proposed regulation should, therefore, have an opt-in feature. The regulation should prohibit debt collectors from using non-traditional methods of communication *unless* the consumer either affirmatively opts-in to receiving them, or in the

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[21] *Lavalle v Med-1 Sols., LLC*, 932 F.3d 1049 (7th Cir. 2019)
[22] *NPRM* at 23311, 23312.

alternative, opts-out automatically if a second text or other non-traditional communication is not responded to within a predetermined number of days. We also recommend providing a method for consumers that have opted-in to easily opt-out using any method of communication.

We recommend for those consumers who have opted-in to receive communications via a non-traditional method that CFPB develop limits on the frequency of communications and attempted communications a debt collector can make for each type of nontraditional communications. We also, for the reasons discussed above, recommend that the CFPB disallow hyperlink notices. Such limitations help prevent debt collectors from using such non-traditional communications to annoy and harass consumers.

V. MODEL NOTICE PROPOSED IS INADEQUATE AND CONFUSING

The rule proposes a model notice that would not adequately inform consumers of their rights and would potentially be confusing and itself misleading about the nature of the debt and how it may be contested. Specifically, the notice appears to indicate that a payment is required by a consumer in order to request verification of the debt or demand no contact on the account. The notice also appears to only allow the consumer to request a verification of the debt based on categorized choices: 1) "This is not my debt," 2) "The amount is wrong," and 3) "Other (please describe on reverse or attach additional information." The collector has a legally required responsibility to verify the debt for the consumer. The onus should not be on the consumer to declare the reason the debt is invalid before even receiving the appropriate documentation from the collector. The CFPB should require collectors to include an accurate statement of rights in all debt collection notices, and require validation notices to be provided in writing by mail instead of just orally. Collectors should also be required to provide notices in Spanish or other languages, regardless of the language of the original transaction.

CONCLUSION

The proposed rule is deeply flawed as a matter of law and as a matter of policy. As detailed above, if adopted, the proposed rule would skew the balance between consumers and debt collectors to unjustifiably favor debt collectors and incentivize their abusive tactics.

Respectfully submitted,

The Amara Legal Center
DC Fiscal Policy Institute
Matthew Fraidin, Associate Dean, Clinical and Experiential Programs
Professor of Law University of the District of Columbia David A. Clarke School of Law
(Affiliation included for identification purposes only)
Jewish Community Relations Council of Greater Washington
Legal Aid Society of DC
Neighborhood Legal Services Program of DC (NLSP)
Rising For Justice
Tzedek DC
The Washington Lawyers' Committee for Civil Rights and Urban Affairs

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Addendum: Profile of Parties Filing the Comments

The Amara Legal Center is a community based organization that provides legal services to individuals whose rights have been violated while involved in commercial sex, most often our clients are victims of sex trafficking. In addition to being physically, emotionally, and sexually abused, Amara's clients are also financially exploited by their traffickers. Often traffickers use our clients' identities to incur debt and default on loans, leaving our clients to resolve the matters when they are able to leave their traffickers. As a result, Amara assists clients with victim advocacy that often includes assistance with consumer debt collection and identity theft.

The **DC Fiscal Policy Institute** promotes opportunity and widespread prosperity for all residents of the District of Columbia through thoughtful policy solutions. DCFPI influences DC budget and policy decisions to reduce poverty and income inequality and to give residents the opportunity for a secure economic future. We accomplish this through research and analysis, direct engagement with policymakers, and strategic partnerships with other organizations and individuals. Essential to accomplishing our mission, DCFPI also furthers ways to make DC public services more effective and to ensure the workings of DC government are open and accountable to the public.

The **Jewish Community Relations Council of Greater Washington** (JCRC) is the public affairs and community relations arm of The Jewish Federation of Greater Washington representing over 100 Jewish organizations and synagogues throughout DC, Maryland, and Virginia. The JCRC focuses on government relations, Israel advocacy, inter-group relations, and social justice.

The **Legal Aid Society of the District of Columbia** (Legal Aid) is the oldest and largest general legal services provider in DC, formed in 1932 to provide legal aid and counsel to indigent persons in civil law matters and to encourage measures by which the law may better protect and serve their needs. Legal Aid advocates on behalf of its clients to preserve affordable housing, ensure access to critical safety net benefits, protect consumer rights, and keep families safe and stable. As part of its consumer law practice, Legal Aid represents consumers in debt collection matters filed in District of Columbia courts. Through this on-the-ground work, Legal Aid attorneys regularly encounter and assist consumers who have been subjected to a variety of abusive debt collection tactics, including unfair practices covered by the FDCPA.

Neighborhood Legal Services Program of D.C. (NLSP) has provided free civil legal services to low-income D.C. residents for over 50 years. We provide these services at our three offices located in the most underserved areas of the District, including two east of the Anacostia River. The Economic Security Unit at NLSP helps to create pathways out of poverty and increase financial stability by helping clients to obtain income, protect the income they receive, and reduce the amount they must pay for credit and other services. ESU provides representation to D.C. residents in consumer matters, including debt collection defense, credit reporting problems, student loans, and enforcing federal and local consumer protection laws. In addition, NLSP runs a court based help center, the Small Claims Resource Center, in D.C. Superior Court where most debt collection cases are heard in Washington, D.C.

Rising For Justice (formerly DC Law Students in Court) believes everyone deserves justice – today, tomorrow and always, but recognizes the justice system is broken – overburdened, underfunded, and simply inaccessible for too many. Rising For Justice believe together we can do better. To prevent injustices today, we represent individuals who are in grave legal jeopardy.
To build a better tomorrow, we teach law students to be life-long advocates for justice.
To ensure justice always, we innovate sustainable solutions to problems of justice and equity.
Since our founding, we have protected the rights of more than 250,000 District of Columbia residents and trained almost 4,000 social justice advocates.

Tzedek DC is a non-profit 501c(3) public interest center headquartered at the University of the District of Columbia David A. Clarke School of Law that works to safeguard the rights and interests of DC residents with lower incomes who are dealing with often unjust, abusive, and illegal debt collection practices, as well as other consumer protection problems like credit reporting issues, identity theft, and predatory lending. Tzedek DC has substantial experience in representing alleged debtors in lawsuits and legal matters against debt collectors, debt buyers, primary creditors, and businesses that inform the above comments on the proposed regulations implementing the Fair Debt Collection Practices Act.

The Washington Lawyers' Committee for Civil Rights and Urban Affairs works to create legal, economic and social equity through litigation, client and public education and public policy advocacy. While we fight discrimination against all people, we recognize the central role that current and historic race discrimination plays in sustaining inequity and the critical importance of combating policies and practices that disproportionately harm persons of color.